

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
OF THE UNITED STATES

July 1, 1949, to June 30, 1950

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VOLUME 14



UNITED STATES GOVERNMENT PRINTING OFFICE : WASHINGTON : 1950

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In re Applications of  
G. A. RICHARDS, TRANSFEREE,

and  
HARRY J. KLINGLER, LAWRENCE P. FISHER,  
and JOHN A. HANNAH, TRANSFEREES.

For consent to the transfer of control of  
KMPC, THE STATION OF THE STARS, INC., Los  
ANGELES, CALIF.;

DOCKET NO. 9402

WJR, THE GOODWILL STATION, INC., DETROIT,  
MICH.;

DOCKET NO. 9403

WGAR BROADCASTING CO., CLEVELAND, OHIO;  
KMPC, THE STATION OF THE STARS, INC., Los  
ANGELES, CALIF.

DOCKET NO. 9404

DOCKET NO. 9405

For renewal of license of Radio Station  
KMPC, Los Angeles, Calif.

WJR, THE GOODWILL STATION, INC., DETROIT,  
MICH.

DOCKET NO. 9409

For renewal of license of Radio Station  
WJR, Detroit, Mich.

WGAR BROADCASTING CO., CLEVELAND, OHIO.

DOCKET NO. 9406

For renewal of license of Radio Station  
WGAR, Cleveland, Ohio.

JANUARY 11, 1950

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION (COMMISSIONER HENNOCK NOT PARTICIPATING):

We have before us a "Motion to change issues and for other relief" in the above-entitled matter, filed November 7, 1949, on behalf of G. A. Richards and the above licensees of radio stations KMPC, WJR, and WGAR.

In Dockets 9402, 9403 and 9404 (the transfer cases) the Commission is requested to delete from the hearing order of July 25, 1949 (FCC 49-1021; 14 F. R. 4831) issues 1, 2, 3, 4, and 8. These issues concern (1) whether Richards gave instructions to slant news; (2) whether disciplinary action was taken in cases of refusal to carry out instructions; (3) whether any such instructions were carried out; (4) whether in the light of information adduced under 1, 2, and 3 the licensee corporations are qualified to continue as licensees of the three stations; and (8), in the light of information adduced under issues 1, 2, and 3, the proposed program policies to be followed by the licensees if the proposed transfers are effected. If these issues were deleted as requested the only remaining issues would involve no questions as to

Richards' qualifications or the past operation of the three stations. The remaining issues would be concerned with (5, 6, and 7) possible rights and control remaining in Richards after the proposed transfer, and (9 and 10) the qualifications of the transferees, and whether the transfer would be in the public interest.

In Dockets 9405, 9468, and 9489 (the renewal cases) the parties request the Commission either (1) to strike all issues now specified by the Commission in its order of September 28, 1949 (FCC 49-1229; 14 F. R. 6996), or (2) in the alternative, to sever the proceedings from those with which they are now consolidated (the transfer cases), postpone indefinitely the designation of any date for hearing, and extend all the licenses temporarily until the remaining issues in the transfer cases have been ultimately resolved. The issues which are sought to be deleted relate to questions of possible impropriety in the past operation of the stations, and to the accuracy of representations made to the Commission by and on behalf of Richards.

The major arguments set forth by the petitioners are, first, that the precarious state of Richards' health would make it impossible for him to appear at the scheduled hearing without grave danger to his health and life. In this connection it is argued that it would be impossible to have an adequate hearing upon the issues as they now stand without Richards' presence, since the issues center around questions of the conduct of Richards. Second, it is argued that the Commission has no jurisdiction to inquire into the issues sought to be deleted, and that any consideration of these issues by the Commission would be an unwarranted assertion by the Commission of authority over program content, and would amount to censorship in violation of section 320 of the Communications Act and of the free speech provisions of the first amendment of the Constitution.

The argument is thus directed to attempting to show that, for various reasons, the Commission may not or should not take into consideration in this proceeding aspects of past operation coming within the scope of the issues sought to be deleted. We fail to find any argument that we may not or should not consider matters within the scope of Issue No. 4 of our order of September 28, 1949 with respect to the accuracy of representations made in affidavits and pleadings submitted to the Commission by and on behalf of G. A. Richards.

We turn first to petitioner's request that the transfer applications be considered and disposed of prior to consideration of the renewal applications. In the past the Commission has in a number of cases refused to permit transfers by licensees who have been found to be unqualified and has regarded the resolution of outstanding questions concerning the qualifications of licensee-transferors as a condition precedent to consideration of a transfer application. When such questions have been resolved in the licensee's favor a transfer has been permitted. Conversely, if the licensee has been found unqualified, the transfer application has been dismissed. Thus in the *WOKO* and *WOL* cases (*In re WOKO, Inc.*, 10 F.C.C. 454 (1945), petition for reconsideration denied April 4, 1947, 8 Pile & Fischer, R. R. 1061; *In re Broadcasting Service Organization, Inc. (WOL)*, 3 R. R. 979 (1947)), the Commission refused to permit transfers by licensees who were not found qualified for renewals of licenses. In the *KPNP* and *Julio Conesa* cases (*In re KPNP, Inc.*, 3 R. R. 53 (1945); *In re Julio*

*Omaha*, 3 R. R. 158 (1940)) the Commission consented to transfers from parties whose qualifications were in issue only after inquiring into and resolving questions going to the qualifications of the transferors. We are not persuaded by petitioners' argument that in the present case we should consider the transfer applications without first passing upon the renewal applications of the present licensees.

Petitioners' argument that we should delete the hearing issues concerning past operation centers largely on contentions with respect to censorship and freedom of speech; but in our opinion the lengthy argument along these lines is not in point. It seems clear that the question presented by the present petition is not one of Richards' private views and his right to express them, but rather whether Richards, whatever his own views, has and will adequately discharge the responsibility of a licensee. See *NFBF Broadcasting Association v. Federal Radio Commission*, 60 App. D. C. 79, 47 F. 2d 670; *Trinity Methodist Church, South v. Federal Radio Commission*, 61 App. D. C. 311, 62 F. 2d 850, cert. den. 288 U. S. 599; and this Commission's *Report on Editorialization by Broadcast Licensees* of June 1, 1949 (Docket 8216; FCC 49-769; 14 F. R. 3055), particularly paragraph 17.

Petitioners also argue that the Commission's action, in including in the hearing orders of July 25, 1949, and September 28, 1949, issues with respect to the past operation of the station, is inconsistent with thinking imputed to the Commission in its action of March 17, 1949, in indefinitely postponing the hearing which had been scheduled for March 23, 1949 upon similar issues. Our Order of March 17, 1949 (Docket 9193), as it indicates, was in response to request of counsel for Mr. Richards dated March 16, 1949 for a 30-day continuance. That request was supported by affidavits of Mr. Richards' physicians to the effect that a continuance of the hearing was necessary, and by representations that in view of Mr. Richards' health he intended within 30 days to submit to the Commission an application to transfer the control of all stock owned by Mr. Richards in the three licensee corporations. We stated in that order that "upon the filing of such application the Commission will then decide whether such hearing should be consolidated with the above-entitled proceeding. At that time the Commission will also determine the further hearing date in the above-entitled proceeding and also in the consolidated proceeding if the transfer application is consolidated for hearing with the above-entitled matter." We are not persuaded that the fact that we have thus in our discretion allowed petitioners considerable procedural latitude, and granted a number of requests for continuances, is equivalent to a decision on the substantive issues involved or militates against our now considering such issues.

We may point out that petitioners have had an extended period of time in which to submit to us material in support of the grant of their applications without the necessity for a hearing. We apprised the applicants more than a year ago of the nature of the allegations which have been made concerning Mr. Richards and the stations, as set forth in the above orders designating these applications for hearing, and have received various statements and representations from and on behalf of Richards and the licensees concerning the matter. The material and arguments which have been presented fail, however, in our

opinion, to resolve in favor of the licensee important questions as to their qualifications.

Although we are unable to determine, upon examination of the present applications in the light of all the related information and allegations available to us, that public interest, convenience, or necessity would be served by the granting thereof, the Commission is affording the applicants "an opportunity to be heard under such rules and regulations as it may prescribe" (Section 309 (a), Communications Act of 1934). It seems clear, however, that the burden is on an applicant to go forward with his application; and that the inability of an applicant, because of permanent physical incapacity of key witnesses or for other reasons beyond the control of the Commission, to prosecute his application so by availing himself of the opportunity to be heard afforded him by the Commission, does not necessitate the conclusion that the Commission must act favorably on the application despite the applicant's failure to make the legally requisite showing.

This does not mean that we are indifferent to the problem presented when the strain of participating in a hearing would jeopardize the health of a principal in an applicant or an important witness on behalf of the applicant. And in the present case, if the applicants wish to take advantage of the opportunity to be heard which the Commission is affording them, and if Mr. Richards desires to appear, we will cooperate in making every reasonable provision and accommodation for his physical comfort and well-being which may seem desirable in the light of such full medical information and advice as may be available to us at the time of the hearing. Since we are not unaware that during most or much of the time of the chronic illness of Mr. Richards to which his physicians attest, he has maintained a certain amount of physical activity, we believe that it may be possible to conduct a hearing in such a manner as to impose no unaccustomed physical strain on him.

For the foregoing reasons it is ordered, this 11th day of January 1950, that the above "Motion to change issues and for other relief" is denied.

It is further ordered, that the hearing in this matter will commence at 10 a. m. March 12, 1950, in Los Angeles, Calif., at a place and before a presiding officer to be specified by subsequent order of the Commission.<sup>3</sup>

<sup>3</sup> Commissioner Hyde dissented and voted for a grant of the alternative relief requesting postponement of the hearing to the recesses, pending hearing on the transfer application.

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LOS ANGELES, CALIF.;	
WJR, THE GOODWILL STATION, INC., DETROIT,	DOCKET NO. 9403
MICH.;	
WGAR BROADCASTING CO., CLEVELAND, OHIO.	DOCKET NO. 9404
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WGAR BROADCASTING CO., CLEVELAND, OHIO.	DOCKET NO. 9409
For renewal of license of Radio Station	
WGAR, Cleveland, Ohio.	

March 1, 1950

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION (COMMISSIONER HYDE NOT PARTICIPATING):

1. The Commission has before it for consideration (1) the motion of the above-entitled applicants for a more definite statement of matters of fact and law asserted and for a bill of particulars filed herein on the 21st day of February 1950; and (2) the petition of the above-entitled applicants for conformance of procedure to section 9 (b) of the Administrative Procedure Act by according applicants an opportunity to demonstrate or achieve compliance with all lawful requirements, also filed herein on the 21st day of February 1950. These pleadings will be discussed in the order mentioned.

2. The applicants, in support of their motion for a more definite statement of matters of fact and law asserted and for a bill of particulars, contend: (1) that section 5 of the Administrative Procedure Act requires that they be informed of the matters of fact and law asserted; (2) that in order to properly prepare for trial they be informed of the allegations which they will be called upon to answer; (3) that these

proceedings are in effect proceedings directed towards withdrawal, suspension, revocation or annulment of the licenses of the three corporate applicants; (4) that at no time have any facts or conduct which may warrant the institution of these proceedings been called directly to the attention of the applicants; (5) that the Commission conducted an investigation of the conduct of G. A. Richards in relation to the operation of the stations involved and applicants have not been apprised of the documents or evidence obtained; and (6) that, therefore, demand is made for particulars without which it is alleged applicants cannot safely go to trial.

3. A review of this proceeding is necessary to fully understand the motion now before us. On August 12, 1948, Mr. George A. Richards, principal stockholder in the applicant corporation, was furnished with a copy of the complaint of the Radio News Club with accompanying affidavits, and was requested to submit a sworn statement with respect to the matters raised by the complaint. On September 3, 1948, Mr. Richards and Mr. Frank Mullen, then president of the three applicant corporations, filed with the Commission their affidavits in response to the complaint of the Radio News Club. At the same time a document entitled "Study of Newscast Scripts of station KMPC by E. Z. Dimitman" was filed by the applicants, and was referred to and relied on in Mr. Richards' affidavit.

4. On November 12, 1948, the Commission issued an order for public investigatory hearing with respect to the corporate applicants. In this notice of investigatory hearing the Commission recited the filing of the complaint by the Radio News Club and the filing of the affidavit of Mr. Richards, and specified issues on which that hearing was to be held. A comparison of this notice of hearing with the matters covered in the affidavit of Mr. Richards shows that the issues specified are matters as to which Mr. Richards made statements in response to the complaint of the Radio News Club. On December 22, 1948, the Commission issued a notice setting this investigatory hearing for February 21, 1949. By a further order of February 16, 1949, the hearing was continued to March 16, 1949.

5. On February 24, 1949, a petition was filed by Mr. G. A. Richards and the corporate applicants requesting that Mr. Richards be afforded an opportunity to be heard by the Commission *en banc* and that any further hearing be held in Washington. In requesting that he be afforded a hearing *en banc* in Washington, Richards in this petition made certain admissions of fact with respect to the material submitted to him by the Commission and stated that "By hearing petitioner in person the Commission will afford petitioner an opportunity to admit the wrongfulness of certain acts shown by said documents and statements, and to give the Commission satisfactory assurances against the recurrence of such acts." In this petition he further stated that "Petitioner feels that he has not been afforded an opportunity to admit, answer, or explain the charges against him, except insofar as this was done by the Commission's letter of August 12, 1948. He therefore requests such an opportunity." Examination of this petition filed on the eve of an earlier scheduled hearing shows that at that time the petitioner and his counsel, some of whom now represent the three applicants, in asking for a specific kind of hearing at an early date, had



no question as to the adequacy of the notice afforded by the Commission. The major questions raised in that petition related rather to the manner in which petitioner should be afforded a hearing in which he would have an opportunity to meet the charges which he apparently had no difficulty in understanding. This petition was denied by an order of the Commission dated February 25, 1949. On March 4, 1949, the hearing scheduled for March 16, 1949 was continued by the Hearing Commissioner on the Commission's own motion until March 23, 1949, in order to give counsel for the Commission and other counsel additional time for preparation.

6. On March 16, 1949, counsel for G. A. Richards requested a continuance of the hearing then scheduled for March 23, 1949, for a period of 30 days. In this petition counsel stated a continuance of the hearing was necessary because of the state of Mr. Richards' health and furnished affidavits of physician with respect to this. He further stated that Mr. Richards intended to file within 30 days an application for transfer of voting control of his stock. By an order dated March 17, 1949, the Commission granted the request for continuance and cancelled the hearing date of March 23, 1949. And the Commission also provided that after the filing of a transfer application the Commission would determine the further hearing date in the investigatory proceeding and also in the consolidated hearing, if the transfer application is consolidated for hearing with the investigatory proceeding. Again, at this time no question was raised as to the adequacy of the notice of issues.

7. Thereafter, on July 25, 1949, the Commission issued an order for hearing on the above applications of G. A. Richards and others for transfer of control and specified issues and also issued an order for hearing on the application for renewal of WGAR Broadcasting Co. Both the notice of hearing on the transfer applications and the WGAR application contained issues substantially identical with those set out in the notice of investigatory hearing. On August 5, 1949, the applicants, among others, filed a petition for extension of time within which to file a motion to change the issues specified in the orders of hearing of July 25, 1949. This petition was granted by an order dated August 12, 1949, extending the time to file such a motion to September 19, 1949. On September 15, 1949, a further petition for such an extension of time to file a motion to change the issues was filed. This was granted by an order dated September 16, 1949, extending the time to October 19, 1949.

8. Meanwhile on September 28, 1949, the Commission issued an order designating the renewal applications of KMPC, The Station of the Stars, Inc.; WJR, The Goodwill Station, Inc.; and WGAR Broadcasting Co. for hearing in a consolidated proceeding with the applications for transfer of control of these three applicants which superseded the order of July 25, 1949, designating the application for renewal of license by WGAR Broadcasting Co. The order of hearing with respect to the three stations issued on September 28, 1949, set out the same issues as those contained in the order of July 25, 1949, with respect to the WGAR renewal application. On the same date an order was issued vacating the order for an investigatory hearing. On October 17, 1949, the applicants filed a third petition for extension of

time in which to file a motion to change the issues. This petition was granted by an order of October 21, 1949, extending the time to November 7, 1949, on which date applicants filed their motion to change the issues, and for other relief.

9. In the 16 page "Motion to change issues and for other relief" and in the 22 page brief accompanying that motion, filed by counsel for applicants on November 7, 1949, no claim was made that the issues relating to the past conduct of Mr. G. A. Richards in the management and operation of the applicant stations were too indefinite to inform them of the nature of the hearing to be held. Indeed, it appears from that motion that applicants had sufficient knowledge of the matters raised by these issues to direct detailed and extensive legal argument to the question of the authority of the Commission "to inquire into the matters set out in the issues \* \* \* moved to be stricken." That motion to change issues was denied by a memorandum opinion and order of the Commission issued on January 11, 1950. In that order, the Commission also set the present hearing date of March 13, 1950. The present profession of ignorance as to the matters to be canvassed in that hearing now comes nearly a month and a half after the issuance of the order setting the hearing date, 90 days before that hearing is scheduled to be held, and almost 7 months after these issues were first published in the Federal Register on August 3, 1949.

10. The foregoing recital of what has so far occurred in this case shows that applicants have been informed of the charges which resulted in the holding of these hearings on the issues specified, and have been furnished with affidavits and other material which were filed with the Commission in support of those charges. All the pleadings so far filed, until the present motion for a bill of particulars, neither claim nor reveal any inability to understand the hearing issues. To grant the motion for the bill of particulars now requested would unreasonably delay the holding of the hearing which has already been delayed a substantial period of time on the basis of other requests made by the applicants. There has evidently been ample opportunity for filing a motion for a bill of particulars at an earlier date, if the need for such a bill of particulars as an indispensable prerequisite for going to hearing was felt by the applicants. We believe, therefore, that further delay at this late date to furnish the extensive mass of details requested would not be "conducive to the proper dispatch of business and to the ends of justice" (Sec. 4 (j)); that the applicants already have long had adequate notice of the issues on which testimony will be adduced at the hearing to enable them to prepare their presentation with respect to those issues; and that they will have ample opportunity to prepare their case as to any particular matters presented at the hearing by appropriate continuances for such preparation during the course of the hearing.<sup>1</sup>

11. In support of the petition for conformance of procedure to section 9 (b) of the Administrative Procedure Act by according the corporate applicants an opportunity to demonstrate or achieve compliance with all lawful requirements, the applicants contend (1) that these proceedings are in effect directed towards withdrawal, suspen-

<sup>1</sup> See *First Union Corporation v. National Labor Relations Board*, 131 F. 2d 916, 932 (C. A. 5); *National Labor Relations Board v. Egan Mining and Products Inc.*, 199 F. 2d 525, 537 (C. A. 5).

sion, revocation or annulment of the licenses of the three corporate applicants; (2) that section 9 (b) of the Administrative Procedure Act requires that in such cases applicants be given an opportunity to demonstrate or achieve compliance with all lawful requirements prior to the institution of agency proceedings; (3) that the Commission, in instituting these proceedings, is relying on facts and conduct as to which no notice has been given to any of the applicants. The position of applicants is without merit. The reasons why section 9 (b) of the Administrative Procedure Act is not applicable to license renewal proceedings have been fully set out in our memorandum opinion and order *In re application of the Northern Corp. (WMEX)* released April 30, 1948, 4 Pike & Fischer R. R. 333. We think that these reasons are applicable with especial force in the present cases in which the qualifications of the applicants to be licensees and operate their stations in the public interest must now be determined in the light of the manner in which they and their principal stockholder have hitherto discharged these responsibilities.

12. In view of the foregoing we are of the opinion the above motion and petition of the applicants are without merit and must be denied.

13. Accordingly, it is ordered this 1st day of March 1950 that the above motion and petition are denied.

14 R. R. C.

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For renewal of license of Radio Station WJR, Detroit, Mich.	
WGAR BROADCASTING CO., CLEVELAND, OHIO.	DOCKET NO. 9405
For renewal of license of Radio Station WGAR, Cleveland, Ohio.	

March 24, 1950

**MEMORANDUM OPINION AND ORDER**

BY THE COMMISSION (COMMISSIONERS WALKER AND HYDE NOT PARTICIPATING):

The Commission has under consideration a motion filed on March 13, 1950 by KMPC, the Station of the Stars, Inc., Los Angeles, Calif.; WJR, the Goodwill Station, Inc., Detroit, Mich.; WGAR Broadcasting Co., Cleveland, Ohio; and G. A. Richards asking that the Commission set aside its order of January 16, 1950, appointing a hearing examiner in the above entitled proceedings on the grounds that the Commission's order for a hearing on the renewal applications under section 309 (a) of the Communications Act constitutes an "investigation instituted upon the Commission's own motion" under the provisions of section 5 (a) of the act, which, it is alleged, require that the hearings be held before the full Commission; and also that the present proceedings are "contested proceedings involving the taking of testimony at public hearings," "without the consent of the parties," which section 5 (a) requires to be held before the Commission *en banc*.

14 F. C. C.

The Commission's orders which designated these proceedings for a hearing made it abundantly clear that the hearing was to be based on the applications for transfer and renewal of the station licenses in question. In light of that fact, the hearing presently being conducted in these proceedings is clearly governed by the provisions of section 409 (a) of the Communications Act which expressly authorize the Commission to designate examiners to preside at hearings involving applications for transfer or renewal of station licenses.

It is clear from the language of section 5 (c) of the Communications Act, that the provisions of that section are in no way concerned with the authority of the Commission to designate examiners to preside at hearings. That section deals solely with delegations of authority and imposes certain limitations on the Commission's power to delegate authority to make final disposition of certain enumerated types of proceedings. Thus the section refers to the Commission's authority to assign "any portion of its work, business, or functions \* \* \* for action thereon \* \* \*"

It is, therefore, ordered this 21st day of March 1950, that the motion to set aside the order appointing a hearing examiner, is denied.

**H. F. C. C.**

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G. A. RICHARDS, TRANSFEREE**

AND

**HARRY J. KLINGLER, LAWRENCE P. FISHER,  
AND JOHN A. HANNAH, TRANSFEREES,**

**FOR CONSENT TO THE TRANSFER OF CONTROL OF  
KMPC, THE STATION OF THE SEARS, INC.,  
LOS ANGELES, CALIF.;**

DOCKET NO. 9402

**WJR, THE GOODWILL STATION, INC., DE-  
TROIT, MICH.;**

DOCKET NO. 9403

**WGAR BROADCASTING CO., CLEVELAND, OHIO.**

DOCKET NO. 9404

**KMPC, THE STATION OF THE SEARS, INC.,  
LOS ANGELES, CALIF.**

DOCKET NO. 9405

**FOR RENEWAL OF LICENSE OF RADIO STA-  
TION KMPC, LOS ANGELES, CALIF.**

**WJR, THE GOODWILL STATION, INC.,  
DETROIT, MICH.**

DOCKET NO. 9460

**FOR RENEWAL OF LICENSE OF RADIO STA-  
TION WJR, DETROIT, MICH.**

**WGAR BROADCASTING CO., CLEVELAND, OHIO.**

DOCKET NO. 9405

**FOR RENEWAL OF LICENSE OF RADIO STA-  
TION WGAR, CLEVELAND, OHIO.**

JUNE 12, 1950

**MEMORANDUM OPINION AND ORDER**

**BY THE COMMISSION (COMMISSIONERS COX, CHAIRMAN, AND JONES  
NOT PARTICIPATING; COMMISSIONER HYDE CONCURRING IN PART):**

1. The Commission has before it the petition of its general counsel, filed on June 6, 1950, for review of the ruling of examiner James D. Cunningham, rendered on June 4, 1950, at Los Angeles, Calif., directing that the applicants proceed first with the presentation of evidence at the *de novo* hearing in this proceeding. The general counsel requests that upon such review the Commission reverse the ruling of the examiner and reinstate the original procedure in this case (established at a pre-hearing conference on March 1, 1950 before the original examiner, the late chief examiner J. Fred Johnson, Jr.), under which the general counsel was to proceed first with the presentation of Commission witnesses and testimony on issues 1, 2, and 3, as set forth in the Commission's order of July 25, 1949, and issues 1, 2, 3, and 4 of the Commission's order of September 28, 1949. An opposition to the general counsel's petition for review was filed by the applicants on June 8, 1950, together with a request for oral argument in the matter.

14 F. C. C.



Under the circumstances and particularly since oral argument would serve no useful purpose, the request therefor is denied.

2. A summary of certain pertinent actions in this proceeding will aid in an understanding of our ruling herein. On February 21, 1950, the applicants filed a series of pleadings enumerated below.<sup>1</sup> In the motion for ruling that the burden of going forward is on the Commission, the applicants asserted that the issues were "accusatory in nature;" that the proceeding came within the meaning of the phrase "other like proceedings instituted by the Commission" in which, pursuant to section 1.842 of the Commission's rules, the commission opens and closes;<sup>2</sup> that it is a general legal principle of due process that the party making the accusations must bear the burden of going forward with the evidence in support of the allegations; and that in similar cases in the past (*Don Lee Broadcasting System*, Docket Nos. 7281, et seq.; *Northwestern Corp.* (WMEX) Docket Nos. 5011, 5012), the Commission has proceeded first with the introduction of its evidence. The motion for a more definite statement, etc., and the petition for conformance of procedure were denied by the Commission in its memorandum opinion and order of March 1, 1950. The request for a ruling that the burden of going forward with the evidence should be upon the Commission was considered at the above-mentioned prehearing conference held before examiner Johnson on March 1, 1950. At that conference the general counsel offered to proceed with the introduction of evidence on specified issues at the beginning of the hearings in Los Angeles, Cleveland, and Detroit.<sup>3</sup> The applicants acquiesced in this order of procedure, which was followed at the hearing in Los Angeles before examiner Johnson, which commenced on March 13, 1950, and was adjourned on April 1, 1950, the general counsel of the Commission proceeding with the introduction of evidence on the issues specified. Twenty-three witnesses were called by the general counsel and testified at the Los Angeles hearing; the record comprised 2,015 pages and 94 exhibits.

3. The hearing was scheduled to resume in Los Angeles on May 15, 1950. On May 2, 1950, examiner Johnson died. On May 4, 1950,

<sup>1</sup> These pleadings were: (1) Motion for ruling that burden of going forward is on the Commission; (2) Petition for conformance of procedure to section 2 (b) of the Administrative Procedure Act; (3) Motion for more definite statement of matters at issue and discovery and for bill of particulars; and (4) Motion for prehearing conference.

<sup>2</sup> Section 1.842 provides in part as follows: "Order of Procedure.—At hearings . . . in a proceeding for any instrument of authorization which the Commission is empowered to issue, the . . . applicant . . . shall open and close. At hearings on revocation or modification of a station license under section 312 of the Act . . . or other like proceedings instituted by the Commission, the Commission shall open and close."

<sup>3</sup> The General counsel's statement at the prehearing conference was as follows (Tr. 6): "Mr. Examiner, we might take at this point the fact that I filed a reply to the motion for prehearing conference, and in that reply I stated that we would at this prehearing conference state our position with respect to the matter of proceeding with the evidence."

"I have a statement that I would like to make on that. We believe that the purpose and the duty of persuasion in the consolidated proceedings here are upon the applicants to convince the Commission that the issuance of the license and consent to transfer is in the public interest on the basis of the evidence adduced on the designated issues."

"We realize, however, that even though section 1.842 of the Commission's rules requires an applicant to open and close in proceedings of this kind, due to the nature of this particular proceeding the applicants will not be able to discharge their burden of proof and duty of persuasion by having the Commission counsel open the hearing by presenting evidence on Issues 1, 2 and 3 in the Commission's order of July 23, 1949, relating to the transfer of control, and Issues 1, 2, 3, and 4, of the Commission's order of September 25, 1949, relating to renewal."

"Therefore, in order to assist the applicants in determining what evidence they may desire to present, Commission counsel is willing to proceed first with the introduction of evidence on the issues above specified. This willingness to proceed first is in no way to be construed as relieving the applicants of their burden in this proceeding."

the Commission appointed the present examiner, James D. Cunningham, to preside at the further hearing in the proceeding, and in order to afford the newly appointed examiner time within which to familiarize himself with the record of the proceedings, the date for the further hearing was postponed until June 5, 1950. On May 9, 1950, the applicants filed a motion and memorandum of points and authorities in support thereof, requesting that the Commission's order of May 4, 1950, appointing a new examiner, be modified to provide that the case be heard *de novo*,<sup>4</sup> and that there be stricken from the record "the transcript of all hearings, and all exhibits received in connection herewith [sic] which were held before the former presiding examiner in Los Angeles, California, during the period beginning March 13, 1950 and ending April 1, 1950."<sup>5</sup> In the motion, the applicants expressed a willingness "in the interest of saving time and minimizing expense \* \* \* to proceed with preparation for the presentation commencing on June 5th of testimony with respect to station KMPC from witnesses to be called by the applicants, subject to Commission counsel recalling at a later time such of the witnesses previously heard before the late chief examiner Johnson as Commission counsel may desire to rely on." No formal motion was made by applicants, however, that the order of presentation of testimony established at the prehearing conference of March 1, 1950, and followed at the Los Angeles hearing, be changed. The general counsel filed a statement on May 15, 1950, stating that the Commission was under no legal obligation to grant a hearing *de novo*, but that he would interpose no objection to the grant of a *de novo* hearing as a matter of Commission discretion. On May 23, 1950, the Commission adopted an order granting the applicant's motion, striking the entire record of the proceeding held before the late chief examiner in Los Angeles during the period March 13, 1950, to April 1, 1950, and directing that a *de novo* hearing be held, commencing on June 5, 1950, at Los Angeles. No reference was made in the order of May 23, 1950, to the prehearing conference or to the question of the order of proof.

4. As indicated above, the applicants did not file with the Commission a request that the order of proof previously established be changed, nor did they file with the new Examiner a formal request to this effect. The general counsel thereupon, on the assumption that the *de novo* hearing would proceed in the same order as the original hearing, prepared to present his case at the commencement of the hearings in Los Angeles and arranged for the attendance of many witnesses, some of whom were subpoenaed to appear at the hearings and are entitled to reimbursement for transportation. These witnesses are waiting to be called. On May 25, 1950, the day prior to his scheduled departure from Washington, and after the foregoing preparations were made, the general counsel was informed by examiner Cunningham that counsel for the applicants had seen the examiner and had

\* The applicants contended that one of the principal considerations was the credibility of witnesses, which could be determined largely only by personal observation of their demeanor and manner of testifying by the examiner, and not from a mere reading of the record of the proceedings before examiner Johnson.

<sup>5</sup> This request to strike did not include the proceedings at the prehearing conference of March 1, 1950.

<sup>6</sup> The method of facts in this paragraph is based in part upon statements in the general counsel's petition for review which were admitted or not denied by the applicants.

told him that he would like to, or expected to, proceed first at the hearing which was to start on June 5, 1950. Applicants' counsel gave no notice to the general counsel or any member of his staff that he intended to discuss with the examiner the order of presentation of testimony or any other matter relating to the conduct of the hearing. Upon being informed by the examiner of counsel's visit and his statement to the examiner, the general counsel at once requested the examiner to schedule an immediate prehearing conference. The examiner accepted this suggestion and stated that he would try to arrange such a conference. Later in the day the examiner advised the general counsel that it would be impossible to do so since counsel for the applicants had left Washington and was not expected to return prior to the commencement of the hearing. The general counsel requested that a prehearing conference be held on the matter in Los Angeles, to which the examiner agreed. However, because the examiner did not arrive in Los Angeles until June 4, 1950, it was impossible to schedule the prehearing conference until the day before the hearing was scheduled to recommence.

5. At the prehearing conference in Los Angeles on June 4, 1950, before examiner Cunningham, counsel for the applicants, for the first time publicly stated his request that he be allowed to proceed first with the introduction of testimony on behalf of the applicants. Applicants' counsel argued that he had originally requested the Commission to bear the initial burden of going forward with its testimony because he had not fully known the nature of the Commission's charges against the applicants and the evidence to support such charges. He stated that as a result of the prior hearing he was now sufficiently advised of the Commission's evidence so that he could proceed with the introduction of his own case on behalf of the applicants, and that he was entitled to do so under section 1.842 of the Commission's rules, as his clients were applicants for instruments of authorization, that is, applications for renewals of the licenses to operate stations KMPC, WJR, and WGAR, and transfers to control of such licenses. No reference was made to the applicants' statement in their motion filed on February 21, 1950, in which they had alleged that the proceeding was a "like proceeding instituted by the Commission" within the meaning of the second sentence of section 1.842, under which it is provided that the Commission shall open and close. Nor did the applicants repeat their earlier arguments that in "necessary" proceedings the Commission should shoulder the burden of going forward with the testimony supporting its allegations.<sup>1</sup>

6. After the presentation of arguments on the subject, examiner Cunningham stated that it was his opinion that there was no pretrial conference which had any standing before him, and that any

<sup>1</sup> Applicants' counsel indicated to examiner Cunningham at the June 4 prehearing conference that it was the Commission's refusal of a bill of particulars which had prompted him to argue in the Commission's hearing the propriety of presenting his case "in a manner contrary to the rule and in a manner not very unlike that in the *Northwestern*." As pointed out by the general counsel in his petition for review, however, the requests for a bill of particulars and for a ruling that the Commission should proceed with the introduction of evidence were contained in motions filed on the same day, and were not alternatives requested, but alternatives. It would appear, therefore, that the applicants' request on February 21, 1950, for a decree that the Commission proceed first was not (contrary to the allegations of their opponents' statement at the conference of June 4) nullified upon the refusal of a bill of particulars but was an independent request.

agreements which might have been made between the general counsel, counsel for the applicants, and the late chief examiner were not controlling upon him. He declared that although he felt that it was, as a general rule, desirable for the Commission to proceed first and present its evidence against an applicant so that as examiner he might have the benefit of such testimony in the light of the later showing of the applicant, he deemed himself bound by the provisions of section 1.842, which, he stated, gave an applicant "an absolute right to proceed on his application."<sup>6</sup> Accordingly, he ruled that the applicants had the right to proceed first with the presentation of their evidence at the *de novo* hearing scheduled to commence upon the following day. The general counsel thereupon requested an adjournment of the hearing to permit him to appeal to the Commission from the examiner's ruling, but the request was denied by the examiner. Upon being informed by the general counsel of the foregoing matters, the Commission, on its own motion, by its order of June 5, 1950, directed that the hearing be continued to June 14, 1950, in order to give the Commission an opportunity to rule on the general counsel's appeal.

7. In his petition for review the general counsel contends that to affirm the examiner's ruling as to the order of proof and "to postpone the introduction of the Commission's case at this time until after such time as the applicant may have completed introduction of its testimony would cause great additional expense to the Commission and would mean that the Commission witnesses will have been brought to Los Angeles to testify on three separate occasions; at the first hearing; in order to be present to testify on June 5, 1950, pursuant to the order of testimony established by the pre-hearing conference [of March 1, 1950]; and at such later time as the Commission would begin to introduce its evidence if the ruling of the hearing examiner were allowed to stand." He argues that the examiner erred in declaring himself bound by section 1.842 of the rules to permit the applicants to proceed first, since the section is a procedural rule setting forth in general the procedure governing the introduction of testimony and is subject to modification in individual cases; that it had been expressly settled at the prehearing conference of March 1, 1950, that the Commission should proceed with the introduction of testimony, and since no objection or appeal was taken, and the Commission's order of May 28, 1950, providing for a *de novo* hearing did not affect the record of the pre-hearing conference, the order of presentation of evidence was provided for by that conference; and that to hold that section 1.842 stipulates an immutable procedure would render meaningless section 1.813 of the Commission's rules and section 7 (b) of the Administrative Procedure Act, which specifically provide that the procedure at a hearing may be determined at a prehearing conference.

8. In their opposition to the general counsel's appeal the applicants contend that the Commission's action in granting, upon *ex parte* request, a continuance of the hearing for nine days beyond the date which had previously been set was an unjustified and capricious interference with the conduct of the hearing by the examiner, which deprived the examiner of his right to conduct and regulate the course of the hearing. They allege that the granting of the nine-day adjournment "caused great disruption and damage" and entailed useless and wasteful delay, in that they had made special arrangements for

scores of witnesses to be available in Los Angeles at the hearing beginning on June 5, who are now compelled to rearrange their personal and business plans because of the continuance. Applicants urge that "the examiner should be permitted to proceed with the hearing without interference." They contend, further, that "even if the Commission could properly adjourn these proceedings and substitute itself for the examiner, applicants are entitled to proceed with their application." In connection with this last-mentioned contention they argue that the matter cannot be treated as both a revocation proceeding and a renewal proceeding from the standpoint of the order of proof, that it is one or the other, and if it is a renewal proceeding, they have the right under section 1.842 of the rules to proceed first. They repeat their contention, noted above, that they had been "forced" to permit the Commission to proceed first because of the denial of their "right" to a bill of particulars, "and also because applicants recognized that Commission counsel had the right to proceed first if this proceeding is in truth and in fact a revocation proceeding." Applicants state that the convenience of their witnesses requires that they proceed first, and that the general counsel cannot claim similar treatment for his witnesses, because

Until the order granting a *de novo* hearing was entered on May 23, the Commission's testimony was in the record. It had rested its case, and it could not have had any plans for calling its witnesses. In any event, there could be no disruption of their plans.

9. We are of the opinion that the ruling of the examiner made at the prehearing conference of June 1, 1950, regarding the order of proof, should be set aside. In arriving at this conclusion we have given careful consideration to the applicants' contentions as to the status of an examiner in the conduct of hearings as well as to those relating to their asserted right to proceed first in the present proceedings.

10. We turn first to a discussion of the Commission's right to adjourn the hearing despite the examiner's refusal to do so, to permit the general counsel to perfect his appeal. The authority of the examiners to conduct and regulate the course of hearings is of course not absolute, but under section 7 (b) of the Administrative Procedure Act, is expressly "subject to the published rules of the agency." Section 1.750 of the Commission's rules provides for a review by the Commission of an adverse ruling of the examiner. The power to pass upon the examiner's rulings necessarily connotes an attendant power to issue related or collateral orders to enable the Commission properly to exercise its reviewing authority; otherwise the review power could be rendered nugatory by the officer whose ruling it was proposed to review. Ordinarily, and in the absence of an abuse of discretion, the Commission will not interfere with an examiner's granting or refusing to grant a continuance. (See *In re WGBR, Inc.*, 4 RR 193.) In the instant matter, however, we are of the opinion that the examiner should have ordered an adjournment for the purpose of allowing the general counsel to appeal his ruling to the Commission, and, upon his failure to do so, we accorded the general counsel the requested continuance. In view of the imminence of the scheduled hearing, and the impossibility of the general counsel's raising the question of order of proof previously (discussed more fully below), there was no prejudi-

dial error committed against the applicants because more protracted procedures prior to ordering an adjournment were not followed.

11. In considering the examiner's action in changing the order of proof as to which there had been previous concurrences by the parties, it is not necessary to decide whether, in the ordinary case, an agreement arrived at during a prehearing conference is binding upon another examiner in the same proceeding, as we are of the opinion, under the particular circumstances of this case, that there should have been no alteration of the previously established order of proof. It was made clear to the applicants at the time the general counsel agreed to proceed first, that he was doing so "in order to assist the applicants in determining what evidence they may desire to present," and that his willingness to proceed first was "in no way to be construed as relieving the applicants of their burden in this proceeding"—that is, that the general counsel in no way considered this a revocation proceeding in which the initial burden of going forward would have been upon the Commission, but that for the convenience of the applicants he would introduce his evidence first. Consequently, we are unable to concur in applicants' contention that they were "forced" to agree to the order of proof which they themselves had requested and to which the general counsel had consented out of an abundance of fairness to the applicants. It is not the general counsel but the applicants, in now claiming the right to proceed first in this proceeding, who are adopting inconsistent positions when it suits their purposes to do so.

12. At the time the *de novo* hearing was ordered by the Commission, at the applicants' request and with the concurrence of the general counsel, the latter was on no notice (save for the inconclusive statement that they were "willing" to proceed first at the removal hearings) that the applicants desired a change in the order of proof. Justifiably, therefore, he proceeded to prepare for the *de novo* hearing on the basis that the prior order, established at a prehearing conference of March 1, 1950, the record of which had not been affected by the Commission's Order of May 23, 1950, would still prevail. Arrangements were made by him for the attendance of witnesses at considerable expense to the Commission. We cannot agree with applicants' argument that the efforts of the general counsel in the gathering of his witnesses are not entitled to consideration comparable to that which should be accorded their arrangements because when the order granting a *de novo* hearing was entered on May 23, the Commission's testimony was already in the record and it could have had no plans for calling witnesses. This contention overlooks the fact, referred to above, that applicants' counsel failed seasonably to inform the general counsel of an intention to apply for an alteration in the procedure, and that the general counsel learned of counsel's plans from the examiner when it was already too late to call a prehearing conference in sufficient time before the scheduled hearing to permit a resolution of the question to be made. We have weighed and considered the conduct of the parties and the effect upon their plans of our ruling herein. It is our opinion that a balancing of the equities in this case requires a conclusion that the original order of proof should remain in effect, at least for the Los Angeles hearing. It was not the general counsel but the applicants who precipitated the present conflict by their request for a *de novo* hearing, and although the Commission assented to

their request, they cannot be permitted to change the prior procedure in the presentation of testimony.

15. Accordingly, it is ordered, this 12th day of June 1950, that the ruling of the examiner herein, rendered at the pre-hearing conference in Los Angeles, Calif., on June 4, 1950, permitting the applicants to proceed first with the presentation of their testimony at the *de novo* hearing, is set aside, and that the general counsel of the Commission should proceed first with the presentation of testimony.<sup>3</sup>

<sup>3</sup> *Commissioner-Rife*: I agree with the majority that no oral argument should be had. On the appeal I am of the opinion that the examiner's exercise of his discretion should not be overruled.

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
OF THE UNITED STATES

July 7, 1950 to June 28, 1951

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VOLUME 15



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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In re Applications of	
G. A. RICHARDS, Transferor, and HARRY J. KLINGLER, LAWRENCE P. FISHER and JOHN A. HANNAN, Transferees	
For Consent to the transfer of control of	
KMPC, THE STATION OF THE STARS, INC., Los Angeles, California	DOCKET No. 9402
WJR, THE GOODWILL STATION, INC., Detroit, Michigan	DOCKET No. 9403
WGAR BROADCASTING COMPANY, Cleveland, Ohio	DOCKET No. 9404
KMPC, THE STATION OF THE STARS, INC., Los Angeles, California	DOCKET No. 9408
For renewal of license of Radio Station	
KMPC, Los Angeles, California	
WJR, THE GOODWILL STATION, INC., Detroit, Michigan	DOCKET No. 9469
For renewal of license of Radio Station	
WJR, Detroit, Michigan	
WGAR BROADCASTING COMPANY, Cleveland, Ohio	DOCKET No. 9465
For renewal of license of Radio Station	
WGAR, Cleveland, Ohio	

December 27, 1950

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: Commissioner HENSTOCK not participating.

1. The Commission has before it (1) the appeal (filed December 5, 1950) of its General Counsel from a denial by the Motions Commissioner, dated December 1, 1950, of his petition for an extension of time in which to submit an opposition to motions and petition under Rules 1386 and 1389 which had been filed by applicants in this proceeding on November 20, 1950; (2) a petition to review the rulings of Examiner James D. Cunningham denying applicants' oral motions, made during the course of hearing herein in Detroit, Michigan, that the hearing be recessed, filed by applicants on December 4, 1950;<sup>1</sup> and (3) an "Amendment to Motions and Petition filed under

<sup>1</sup>As will appear below, applicants also requested a recess in their reply to the General Counsel's petition for extension, cited upon by the Motions Commissioner. The General Counsel, in his appeal, states: "Under the provisions of Section 1.742 of the Commission's Rules the request for a recess should probably have been originally directed to the hearing examiner rather than to the Commission, as part of a 'reply'."

Rules 1.386 and 1.389," filed by applicants on December 20, 1950, wherein they delete and withdraw from the aforesaid pleading filed November 20, 1950, the motions made in subparagraphs (3) and (4) thereof. No oppositions were filed by either the General Counsel or applicants to their respective appeals.

2. Extensive hearings in this matter were held in Los Angeles, California, and were recessed on October 19, 1950, to resume in Detroit on November 21, 1950. On November 20, 1950, applicants filed with the Commission a document entitled "Motions and Petition under Rules 1.386 and 1.389 and for Other Relief," accompanied by a supporting brief of 81 pages, which in turn referred to "a separate memorandum to be filed with the Examiner, copies of which will be made available to the Commission, which we request be considered in connection with these motions." The motions and petition requested several courses of action: (1) pursuant to Section 1.386 of the Rules, that the Commission reconsider the designation of station renewal applications for hearing and grant them without further hearing; or (2) pursuant to Section 1.389 of the Rules, that the Commission strike all the issues specified in the Commission's Order of September 28, 1949, and specify as the sole issue whether the performance of the licensees during the period since the last regular renewal of each of their licenses establishes that a grant of the applications would serve the public interest; or (3) that the Commission modify the Order of Consolidation of September 28, 1949, and direct the Examiner to conclude the presentation of evidence on the application of KMPC in Docket No. 9468, and to prepare an Initial Decision upon such application, before proceeding with the hearing on the applications of WJR and WGAR in Docket Numbers 9403 and 9469; and (4) that the hearing on Docket Nos. 9402, 9403 and 9404 be postponed until a final decision is rendered in Docket No. 9468. The time in which to answer this pleading expired on November 30, 1950. On November 24, 1950, the General Counsel filed a petition to extend the time in which to file opposition to December 20, 1950, alleging that the Commission's personnel who are acquainted with the case were engaged in duties of a pressing nature; that many of these people were out of the city and that those remaining in Washington had been constantly engaged in matters relating to the Commission's television hearings; and that under these circumstances it was impossible to prepare an opposition within the period allowed by the Commission's Rules and Regulations. Applicants filed a reply to the General Counsel's petition for extension on November 28, 1950. They stated that if any extension of time was granted the General Counsel, the Commission at the same time should order that the extension must not deprive applicants of an opportunity to receive the relief requested in their motions filed November 20, 1950; that the purpose of the motions was to have the Commission consider the questions involved before proceeding with the hearing on the applications of

In the General Counsel's motion for extension of time to reply to the motions. And in fact applicants have subsequently made such a request for a recess which was denied by the Hearing Examiner on December 2, 1950, and is now on appeal to the Commission. The General Counsel believes no person would be served by listening to this belated objection to applicants' request in their pleading, and is willing to abide by any determination the Commission may reach in the light of the considerations set out herein.

WJR and WGAR; that if the General Counsel filed his opposition on November 30, 1950, the due date, the Commission could act upon the motions before the Examiner began to receive evidence relating to WJR and WGAR; and they submitted that if the General Counsel's petition for extension of time was granted, justice required that the Examiner be required to recess the hearing until a decision is rendered by the Commission on applicants' motions and petition, and that otherwise the mere granting of the extension would defeat applicants' motions. At the request of the General Counsel, oral argument on his petition for extension of time was held before the Motions Commissioner on December 1, 1950. On the same date the Motions Commissioner entered an Order denying the petition, which stated that adequate time for filing an opposition had elapsed and that good cause had not been set forth as to why such opposition was not filed.

3. In his appeal from the action of the Motions Commissioner, the General Counsel points out that at a pre-hearing conference before the Examiner, held in Washington on November 1, 1950, counsel for the applicants had referred to the fact that they expected, at the close of what they considered to be the testimony relevant to the application for renewal of KMPC's license, to request the Commission, by motion, to take the action contemplated in their alternative prayer (3) mentioned in Paragraph 2, above; that the General Counsel thereupon suggested that any such motion should be filed during the recess between the close of the Los Angeles hearings and the resumption of the hearings in Detroit, and stated that he did not think that "we can afford to run that risk of a continuance during that period (after the Detroit hearings started), particularly after we move all of our records to Detroit"; that at the same conference he subsequently said to the Examiner:

... I don't think that it would be appropriate to postpone making any such motion until we get started in Detroit and to require you to make your decision on KMPC. I think it ought to be right now, if there is going to be such a motion made;

and that counsel for applicants then declared that their motion would be made "during the recess, so that the Commission presumably will have decided it, or at least will have an opportunity to decide it." The General Counsel asserts that although applicants "indicated that they had in mind filing motions of the type made at this late date, they nevertheless did not file their motions until November 20, 1950, one day before the end of the recess," when he and all members of his staff connected with the preparation and presentation of the case were already in Detroit, all the staff's working papers were in Detroit, and the General Counsel and his staff were busy with preparation for the recommencement of the hearings on November 21. It is further stated that when the applicants' pleading filed on November 20, 1950, was examined, "it became clear that, in view of the disposition of the members of the Commission's staff familiar with the case and their necessary occupation with the details of the hearing in Detroit, it would be impossible to prepare an adequate response to applicants' motion within the time provided by the Commission's Rules," and that accordingly the General Counsel, on November 23,

1950, filed the request for a 20-day extension of time within which to file his opposition. He argues that the above recital of facts sufficiently demonstrates that his request for extension of time was reasonable, and that "even a cursory examination of the two extensive briefs filed by the applicants in support of their motions shows conclusively that any effort on the part of the General Counsel to refute the many charges made therein, including charges with respect to the integrity of the General Counsel himself, requires the assistance and knowledge of personnel intimately familiar with the history of the case."

4. The General Counsel urges that his request for extension of time presents a question entirely independent of applicants' request that the Commission direct that the case be recessed, as his "request for extension of time is either a reasonable request that should be granted or it is not a reasonable request." He adverts to the fact that the recess mentioned in applicants' reply to his plea for extension had been requested not only for the 20-day extension sought by him, but also for such additional time as the Commission may take to decide applicants' requests in the pleading filed November 20, 1950. The General Counsel states that "in view of the fact that the reasons given for granting any of the motions relate solely to what is alleged to be proved by the hearings already held in Los Angeles, it is clear that no conclusions favorable to the applicants could be reached by the Commission without first carefully considering this extensive record." He argues that it would not be inimical to applicants' right to a fair consideration of its pleading to refuse an indefinite recess, as the Commission could, even though the hearings should continue pending a decision of the motions and petition, grant the relief requested therein, if appropriate.<sup>2</sup>

5. In their "amendment" filed December 20, 1950, deleting and withdrawing motions (3) and (4) from the pleading filed November 20, 1950, applicants declare that because no action was taken by the Commission on their pleading filed November 20, 1950, or on their petition for review filed December 4, 1950,

As a result, beginning on December 5, 1950 the Examiner proceeded to hear evidence on the application of WJR and WGAR in Docket Nos. 9409 and 9400. This action by the Examiner and inaction by the Commission have made moot the request made in subparagraphs (3) and (4) of the Petition and constituted, in effect, a denial of the appeal for review.

They also state that as of the date of the "amendment" (December 18, 1950), the General Counsel had "completed the presentation of . . . testimony relating to the applications of WJR and WGAR, the Applicants have substantially completed the presentation of the testimony on their own behalf and hearings are expected by the Examiner to be concluded not later than December 23, 1950."<sup>3</sup> In conclusion, applicants assert that by the above-mentioned withdrawal they "do not waive their claim of error based upon the Commission's failure to act with reasonable dispatch upon the Petition [filed November 20, 1950] and upon the appeal from the Examiner's ruling

<sup>2</sup> The above quotations were, of course, made by the General Counsel before the applicants withdrew and withdrew of two of their motions on December 20, 1950.

<sup>3</sup> The record herein was closed on December 31, 1950.

filed on Monday, December 4, 1950, or their claim of error based upon the Examiner's ruling of December 2, 1950."

6. We cannot agree that the Commission was remiss in failing to take "timely" action upon applicants' pleadings filed November 20, 1950 and December 4, 1950. As indicated by the General Counsel (see Paragraph 3, above), although they had ample opportunity to file their motions and petition in the earlier part of the Los Angeles-Detroit recess, they waited until the day before the scheduled resumption of the hearings to do so. Thereupon, within the time permitted under the Rules, the General Counsel filed a petition for extension of time to file an opposition. From the Motions Commissioner's denial of his petition for extension, entered on Friday, December 1, 1950, the General Counsel filed an appeal on December 5, 1950, and on December 4, 1950, applicants filed their petition to review the Examiner's denial on December 2, 1950, of their oral motions to recess the hearings. The time to file oppositions to the above appeals under the Commission's Rules, expired on December 14 and 15, 1950. It is evident, therefore, that the resumption and conducting of the hearings during the pendency of applicants' motions and petition before the Commission was initiated by their own action in the filing of this pleading immediately prior to the resumption of the hearings.

7. We are of the opinion that under the circumstances good cause was shown by the General Counsel for an extension of time within which to file an opposition to applicants' pleading filed November 20, 1950, for the reasons set forth in his appeal and referred to above. The resumption and termination of the hearings has obviously rendered moot applicants' request for recess, but we are of the opinion that no good cause had been shown by applicants for an indefinite recess of this protracted proceeding pending disposition of their motions and petition, and that the petition for review of the Examiner's denial of their oral motions of December 2, 1950, paralleling their request for recess contained in their reply to the General Counsel's petition for extension, must also have been denied.

8. Accordingly, it is ordered, this 27th day of December, 1950, That the appeal of the General Counsel from the action of the Motions Commissioner denying his petition for extension of time within which to file an opposition to applicants' motion and petition, is granted to the extent hereinafter set forth; the Order of the Motions Commissioner, entered December 1, 1950, is set aside; the time for filing an opposition to applicants' motion and petition filed November 20, 1950, is extended to January 12, 1951; and the applicants' petition for review of the Examiner's denial of their oral motions for recess, filed on December 4, 1950, is dismissed as moot.

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
OF THE UNITED STATES

July 7, 1950 to June 28, 1951

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VOLUME 15



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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In re Applications of KMPC, THE STATION OF THE STARS, INC., Los Angeles, California	DOCKET No. 9465
For renewal of license of Radio Sta- tion KMPC, Los Angeles, California	
WJR, THE GOODWILL STATION, INC., De- troit, Michigan	DOCKET No. 9469
For renewal of license of Radio Sta- tion WJR, Detroit, Michigan	
WGAR BROADCASTING COMPANY, Clevel- and, Ohio	DOCKET No. 9468
For renewal of license of Radio Sta- tion WGAR, Cleveland, Ohio	

February 21, 1951

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: Commissioners COY (Chairman) and STERLING  
not participating.

1. The Commission has before it a document entitled "Motions and Petition under Rules 1.386 and 1.389 and for other Relief" filed by the applicants in the above-entitled consolidated proceeding on November 20, 1950,<sup>1</sup> an opposition thereto, filed by the General Counsel of the Commission on January 8, 1951,<sup>2</sup> and a reply to the General Counsel's opposition, filed by applicants on January 16, 1951. On January 3, 1951, applicants filed a request for oral argument, and on January 8, 1951, the General Counsel filed a response to such request.

2. This proceeding originally involved six applications<sup>3</sup> all of which concerned stations in the licenses of which G. A. Richards is

<sup>1</sup>As originally filed, this pleading contained four requests, the first three in the alternative. On December 20, 1950, the applicants filed an "Amendment to Motions and Petition filed under Rules 1.386 and 1.389," withdrawing and deleting the motions made in subparagraphs (2) and (4) of the pleading filed November 20, 1950. The pleading filed November 20, 1950, was accompanied by a supporting brief of 31 pages, which in turn referred to "a separate memorandum to be filed with the Examiner, copies of which will be made available to the Commission, which we request be considered in connection with these motions."

<sup>2</sup>In a Memorandum Opinion and Order of December 27, 1950, the Commission extended the time to file an opposition to the applicants' motions and petition, filed November 20, 1950, to January 12, 1951.

<sup>3</sup>Three of these applications requested transfers of control of the licenses of Stations KMPC, WJR and WGAR (Docket Nos. 9462, 9463 and 9464), the December 21, 1950, applicants filed a petition to dissolve these transfer applications without prejudice. A response to this petition was filed by the General Counsel on December 29, 1950. The petition to dissolve was granted on January 29, 1951. Thus, this proceeding now involves only the three above-entitled renewal applications.

the principal stockholder. They were consolidated for hearing on issues designed to determine, among other things, the qualifications of the licensees in the light of the alleged conduct of Mr. Richards in the operation and control of the stations. After extensive testimony had been taken before the late Chief Examiner J. Fred Johnson, Jr., in Los Angeles, California, the hearings were begun *de novo* before Examiner James D. Cunningham, to whom the matter was assigned on the death of Mr. Johnson. The renewed hearings commenced in Los Angeles on June 14, 1950. On October 12, 1950, the Los Angeles phase of the hearings was closed. They were resumed in Detroit on November 21, 1950, and the record herein was closed on December 21, 1950. The record made before the Examiner consists of thousands of pages of testimony and hundreds of exhibits.

3. The instant motion and petition request the Commission to adopt either of two courses of action. These are (1) pursuant to Section 1386 of the Rules, that the Commission reconsider the designation of station license renewal applications for hearing and grant them without further hearing, or (2) pursuant to Section 1389 of the Rules, that the Commission strike all the issues specified in the Commission's Order of September 28, 1949, herein, and specify as the sole issue whether the performance of the licensees during the period since the last regular renewal of each of their licenses establishes that a grant of the applications would serve the public interest.

4. *Petition to reconsider and grant*—Applicants are asking the Commission to take this case from the Examiner and, on the basis of the record, to decide in their favor. Such action would do violence to the procedure established in the Administrative Procedure Act and the Commission's Rules and Regulations. The decision to designate this matter for hearing was reached by the Commission after careful consideration of charges filed concerning the management of the stations, investigation of the charges by members of the Commission's staff, and statements filed on behalf of the applicants. After the designation the Commission denied a motion filed by applicants to change the issue in the proceeding. Hearings occupied many months. From the brief filed by applicants with the motion and petition it is clear that they would have the Commission now examine the extensive record to determine that it was originally mistaken. We need only state that the dictates of orderly procedure require that the record be first considered by the Examiner, after which the Commission would have available, before it issues its Decision, the Initial Decision of the Examiner who is familiar with all the evidence and the arguments on any exceptions which may be filed to the Initial Decision: *Belvedere Broadcasting Corporation*, 5 R. R. 856.

5. In their accompanying brief applicants declare that "the issues presented for determination are of such public importance that they should be reconsidered now by the entire Commission," and summarize portions of the record to indicate that the Commission, in setting this matter for hearing, stepped beyond its authority. Al-



though they state that "if the Commission is to establish standards to govern the presentation of news on all radio stations, it should be done after public hearings where all viewpoints may be presented and not on the hearing of a renewal application where only one viewpoint is represented," they contend that the testimony proves that no standards can be devised "by which to judge whether newscasts are proper, without violating the constitutional privilege of freedom of speech." We need only say now that applicants have not persuaded us that we exceeded our jurisdiction in ordering a hearing (see Memorandum Opinion and Order issued January 12, 1950, herein, 5 R. R. 1292) and that for the reasons mentioned above, we do not propose at this time to review the voluminous record to ascertain its impact on the issues. At an appropriate time we shall make such review, but we see no reason to truncate the Commission's orderly processes by adopting the course suggested by applicants.

6. *Request to change the issues*—The second alternative request made by applicants is that the issues on which the proceeding has been heard be deleted, and that a single issue be substituted therefor. That issue would cover merely a determination whether the licensees' performances since their last regular license renewals establishes that a grant of the present applications would serve the public interest.\* Applicants argue "that the Commission has no right to go back of the date of the prior renewal of a license in considering whether the present application for renewal should be granted. The prior renewals are a decision by the Commission that the operation of the stations up to that time had been proper and that a renewal was in the public interest." No authority is cited for applicants' contention. We are of the opinion that it is without merit. Applicants' argument runs counter to long-established Commission policy in interpreting the Communications Act, which has been affirmed by the courts. Each application for license renewal is decided by the Commission on the basis of the facts before it at the time. A grant of such an application cannot estop the Commission from later considering other facts which may come to light, either through complaints filed with it or through investigation by its staff. The touchstone of the Commission's actions is the public interest, and its regulatory functions cannot be impeded or the full exercise of its powers precluded by an attempt, as here, to import an inapplicable doctrine akin to that of *res judicata*. Cf. *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940). In both *Federal Communications Commission v. WOKD, Inc.*, 329 U.S. 233 (1946), and *Federal Communications Commission v. Broadcasting Service Organizations, Inc.*, 357 U.S. 901 (1949), the Commission had denied applications for renewal on the basis of a record involving events which predated the last license renewal of the stations concerned. The Court affirmed the Commission's action in both cases.

\* Motions to enlarge or change the issues, under Section 1.306 of the Rules, may be made not later than 15 days from the publication of the issues, unless good cause is shown for subsequent filing. However, we shall discuss the instant motion on its merits, despite the late filing thereof.

7. Applicants have requested oral argument with respect to the motion and petition filed November 20, 1950, under Section 1.747 of the Rules. That section concerns matters before the Motions Commissioner or comparable officer, and does not apply to the instant situation. There is no requirement for oral argument on a pleading such as this. Treating applicants' request, however, as a general request for oral argument, it should be denied as oral argument under the circumstances would serve no useful purpose.

8. In his opposition to the instant motion and petition the General Counsel requests that we "strike as sham and frivolous all of the assertions of improper conduct made against members of the Commission's staff in the brief of applicants' counsel," referring specifically to the charges in Point IV of the brief filed with the motion and petition. It is not necessary to a consideration of the motion and petition to pass upon this request of the General Counsel. As indicated above we are not now reviewing the record herein. Under these circumstances we shall not pass on this request of the General Counsel. The fact that we are not now ruling upon this matter is not to be construed as an approval or disapproval of the position of counsel for the applicants or the General Counsel. We have not considered the merits of either position.

9. Accordingly, it is ordered, this 21st day of February, 1951, that the above-mentioned request of applicants for oral argument is denied; and that the motion and petition filed herein by applicants on November 20, 1950, are denied.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In re Applications of KMPC, THE STATION OF THE STARS. (KMPC), LOS ANGELES, CALIFORNIA	DOCKET No. 9468
WJR, THE GOODWILL STATION, INC. (WJR), DETROIT, MICHIGAN	
THE WGAR BROADCASTING COMPANY (WGRA), CLEVELAND, OHIO	
For Renewal of Licenses	
AND	
In re Applications for CONSENT TO INVOLUNTARY TRANSFER OF CONTROL TO FRANCES S. RICHARDS, EXECUTRIX OF THE ESTATE OF G. A. RICHARDS, DECEASED, OF	DOCKET No. 10091
KMPC, THE STATION OF THE STARS, INC. (KMPC), LOS ANGELES, CALIFORNIA	DOCKET No. 10092
WJR, THE GOODWILL STATION, INC. (WJR), DETROIT, MICHIGAN	
AND	
THE WGAR BROADCASTING COMPANY (WGRA), CLEVELAND, OHIO	DOCKET No. 10093

November 28, 1951

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION (CHAIRMAN COY AND COMMISSIONER HENNOCK  
CONCURRING AND ISSUING A SEPARATE CONCURRING OPINION; COM-  
MISSIONER WALKER DISSENTING) :

1. The Commission has before it the Initial Decision of Examiner James D. Cunningham in the above-entitled renewal of license matter, released June 14, 1951, dismissing the renewal proceeding, and the following pleadings filed thereafter:

(1) "Petition to set aside purported 'Initial Decision' and for direction to Examiner James D. Cunningham to prepare an Initial Decision within his authority under the Administrative Procedure Act, the Commission's Rules, and the Order designating the applications of Radio Stations KMPC, WJR and WGAR for hearing," filed by the Chief of the Commission's Broadcast Bureau and the General Counsel of the Commission on June 15, 1951;

(2) "Opposition to petition to set aside Initial Decision, etc. and counter-petition for immediate grant of renewal applications," filed by KMPC, WJR and WGAR on June 25, 1951;

(3) Exceptions to the Initial Decision and request for oral argument, filed by the Chief of the Broadcast Bureau and the General Counsel on July 3, 1951;<sup>1</sup>

<sup>1</sup> A "Motion and Memorandum in Support of Exceptions to Initial Decision by Trial Examiner" was tendered by 18 individuals (not parties to the proceeding), on August 31, 1951.

(4) "Motion to strike exceptions and reply brief to exceptions," filed by KMPC, WJR and WGAR on July 11, 1951; and

(5) "Opposition to motion to strike exceptions and answer to reply brief to exceptions and opposition to counter petition," filed by the Chief of the Broadcast Bureau and the General Counsel on July 23, 1951.

The Commission also has before it the above-entitled transfer applications and certain documents filed in connection therewith which will be described below. For the reasons stated herein, we believe that the transfer applications should be consolidated with the renewal applications, and that the transfer applications as amended by the "Supplementary Statements," discussed below, should be made a part of the record herein. Accordingly, the transfer applications, as amended by the "Supplementary Statements," are consolidated with the renewal applications, and said applications, as amended, are made a part of the record herein.

2. The renewal proceeding, involving the above-entitled applications for renewal of licenses of Stations KMPC, Los Angeles, WJR, Detroit, Michigan, and WGAR, Cleveland, Ohio, had been heard in part before the late Chief Examiner J. Fred Johnson, Jr., from March 13, to April 1, 1950, and after his death during a recess period, *de novo* before Examiner Cunningham from June 14, to December 21, 1950. Proposed findings of fact and conclusions were filed by the applicants and by the General Counsel of the Commission.

3. The issues upon which the renewal matter was designated for hearing and the circumstances leading to such designation are described in the Initial Decision and need not be repeated here. Briefly, however, it may be noted that they indicate that the purpose of the proceeding was inquiry into the actions of G. A. Richards, while an officer or principal stockholder of the corporate licensees, in the operation of the above stations, the effect thereof upon the qualifications of the licensees, and whether a grant of the applications would serve the public interest, convenience and necessity.

4. Mr. Richards died on Sunday, May 27, 1951, a resident of Los Angeles County, California, and under date of May 28, 1951, the applicants notified the Commission of his death. In his Initial Decision dismissing "the proceedings heretofore instituted upon the above-entitled applications for renewal of the licenses of Radio Stations KMPC, WJR and WGAR," the Examiner held (Par. 6) that the death of Mr. Richards—

renders moot all the questions presented under the issues of the proceeding, for, as indicated, the Commission's sole inquiry was whether the three corporate licensees of the stations involved; while under the personal control of Mr. Richards, were qualified licensees of radio facilities, within the meaning of the Communications Act of 1934, as amended. In view of these circumstances, there is no occasion to make detailed findings of fact upon the record herein. Final disposition of the three proposals here involved for the continued operation of these radio facilities will be made pursuant to and in connection with such applications as are expected to be filed in behalf of the corporate licensees for involuntary transfer of control thereof, in accordance with the provisions of Section 310(b) of the Communications Act, and Section 1.323 of the Commission's Rules and Regulations.

5. The Chief of the Broadcast Bureau and the General Counsel request that the Initial Decision "be set aside as an illegal document outside the Examiner's authority and the proceeding be remanded to him with directions to prepare an Initial Decision in accordance with the Administrative Procedure Act, the Commission's Rules, and the Order of the Commission entered herein on September 28, 1949, designating the above-entitled applications for hearing." They urge that under Section 8(b) of the Administrative Procedure Act and Section 1.851(c) of the Rules the Initial Decision should have contained findings of fact and conclusions on "all the material issues of fact, law, or discretion presented on the record," as well as "the appropriate rule, order, sanction, relief, or denial thereof," and that the Examiner made no such findings or determination in accordance therewith whether the applications should be granted or denied. They assert that "he cannot avoid his obligation in this respect by exceeding his authority in dismissing the proceeding and failing to make a determination of the issues of fact and law arising on the record, including whether or not a grant of the applications would serve the public interest, convenience, or necessity. Procedurally, the applications are neither granted nor denied; they are merely pending undetermined with no procedural process for action on them by the Commission. The Examiner has failed to discharge his duties in the administrative process." Moreover, the Chief of the Broadcast Bureau and the General Counsel deny that Mr. Richards' death rendered the issues moot, and cite a transcript reference purporting to show that the station policies established by Mr. Richards and constituting the basis of the present proceeding will continue to govern the stations' operations.<sup>2</sup> They declare, also, that "it is firmly established in Commission policy that a proposed transfer, whether voluntary or involuntary, does not render moot the issues in any pending proceeding for renewal of license, notwithstanding the fact that the transfer would remove from the affairs of the licensee the person or persons whose conduct is involved under the issues in the proceeding," and "that the Commission will not consider transfer applications until it has disposed of the issues in the pending proceedings."

6. In their opposition to the above petition the applicants assert that "the issues enumerated in the Commission's order of September 28, 1949, have necessarily become moot by reason of Mr. Richards' death," that the Administrative Procedure Act and the Rules require

<sup>2</sup> The reference is to questioning of John Patt, the present president of the three corporate licensees, at R. 18, 178:

"Q. There has been a great deal of testimony in this proceeding, Mr. Patt, concerning Mr. Richards' views with respect to broadcasting, and I believe you testified that you had worked closely with him for 22 years.

A. It will be 24 years Christmas Day.

Q. Now, are the policies which he has established, the policies which you will follow as president of these three companies?

A. Our policies are subject to change in the future.

Mr. Fulton: I object, on the ground that the policies, referring to all in the past and all in the future, is too broad to be meaningful.

The Presiding Officer. I sustain the objection to the question.

By Mr. Ford:

Q. Do you know of any policies which Mr. Richards has established in the past which you will not follow?

A. No. We are going to continue to have a policy of good broadcasting."

findings only on *matériel* issues, and that no issue is "material" which has become moot. They state:

For him [the Examiner] to make detailed findings of fact on such issues on the voluminous record in this proceeding (18,265 pages of transcript, about 1,200 exhibits, and over 750 pages of proposed findings, as well as bulky pending motions) would entail a waste of public funds and of the time of the Commission personnel, and injustice and hardship on the parties because of the time, procedural steps and expenses involved.

They argue that neither the Administrative Procedure Act nor the Rules required the Examiner to grant or deny the applications for license renewal, but merely that an appropriate rule, order, sanction, relief or denial be entered, and continue:

By clear implication from paragraph 6 of his initial decision, his reason for not entering an order granting the applications was the fact that, pursuant to Section 1.323(b) of the Commission's Rules, applications for the Commission's consent to involuntary transfer of control of all three applicants would be filed within the prescribed period after Mr. Richards' death (an assurance that was contained in applicants' notices to the Commission on May 28, 1951), and his belief that the above-entitled renewal applications should be before the Commission for action on or before the date on which the Commission acts on said involuntary transfer of control applications. In effect, therefore, his initial decision leaves the Commission free to grant the renewal applications before or in conjunction with the involuntary transfer of control applications. The initial decision is obviously not an attempt by the Hearing Examiner to exceed his authority or a failure to discharge his duties; it is an act of deference to the Commission in view of the changed circumstances due to Mr. Richards' death. It does not in any way dispense, or attempt to dispense, with the statutory requirements that the granting of the applications shall be subject to a determination by the Commission that public interest, convenience or necessity will be served thereby.

7. The applicants contradict the assertion of the Chief of the Broadcast Bureau and the General Counsel that Mr. Richards' death did not make the issues moot, and maintain that the transcript reference purporting to show that the "policies" established by Mr. Richards will not cease with his death, is taken out of context, "but even on its face does not justify the interpretation placed on it by said petition"; that the station policies which it was testified would be continued are "codes" "which are in evidence in the record herein, are and have been exemplary in character and at no time have they been the subject of any criticism in this proceeding"; and that "the acts alleged to have been committed by Mr. Richards from time to time cannot properly be referred to as 'policies' and certainly were not so considered by Mr. Patt, either in the above-mentioned excerpt from his testimony or elsewhere."

8. In their counter-petition the applicants request immediate grant of the license renewal application<sup>3</sup> since grants thereof would serve the public interest and in order to facilitate administration of Mr. Richards' estate, and state that "it is necessary and just that the temporary licenses now held by applicants be replaced by regular licenses and that applications which they now have pending, which are otherwise in proper status for action, be freed from any obstacle to the action which might normally be taken by the Commission in the absence of the pending proceedings."

<sup>3</sup> The applicants are operating their stations under temporary licenses.

9. The exceptions to the Initial Decision, filed by the Chief of the Broadcast Bureau and the General Counsel, reiterate their objections to the Examiner's dismissal of the proceeding as moot, discussed above. In addition, they state that the Examiner erred in failing to make the findings of fact and conclusions set forth in detail in the Proposed Findings of Fact and Conclusions filed by the General Counsel (see Par. 2, above). The exceptions conclude as follows:

In the light of the foregoing exceptions, it is respectfully requested that paragraph 6 and the ordering clause of the Examiner's Initial Decision be stricken and that the Commission make the findings and conclusions set forth in detail in the Proposed Findings of Fact and Conclusions of Law of the General Counsel of the Federal Communications Commission, filed May 14, 1951, or in the alternative grant the relief requested in the *Petition to Set Aside Purported "Initial Decision" and for Direction to Examiner James D. Cunningham to Prepare an Initial Decision within his Authority Under the Administrative Procedure Act, the Commission's Rules, and the Order Designating the Applications of Radio Stations KMPC, WJR, and WGAR for Hearing*.

Oral argument is requested. In their motion to strike the above exceptions, the applicants assert, among other things, that they are "premature and irreconcilable with the position heretofore taken by the Chief of the Broadcast Bureau and the General Counsel," since the Commission has not yet ruled on the above-described petition and counter-petition, and they "are contradictory to, and inconsistent with, said petition of June 15, 1951, in so far as they seek to have the Commission rule on and decide the issues herein instead of remanding the case to the Examiner." In the opposition of the Chief of the Broadcast Bureau and the General Counsel to the motion to strike their exceptions and their answer to the reply brief to their exceptions, among other things it is denied that the exceptions are "premature and irreconcilable," or contradictory to their previous position; and in their opposition to the counter-petition it is asserted that it is "unnecessary to consider the representations made in the applications for transfer of control," for the reason that the Commission had already determined that it would not permit Mr. Richards to transfer control of the applicants to trustees until it was determined whether the licenses should be renewed, and that he could not by his Will accomplish what he could not do by trust instrument until the issues relating to the applicants' renewal of licenses have been determined.

10. The above-entitled applications for consent to involuntary transfer of control, with respect to the stock in each of the three corporate licensees owned by Mr. Richards prior to his death, to his executrix, were filed by Frances S. Richards, Executrix of the Estate of G. A. Richards, deceased, on June 25, 1951. Mr. Richards had been the owner of 133,700 shares out of a total of 240,525 shares of the issued and outstanding stock of KMPC, The Station of the Stars, Inc.; of 134,937 shares out of a total of 516,533 shares of the issued and outstanding stock of WJR, The Goodwill Station, Inc.,<sup>4</sup> of 55,067 shares out of a total of 84,800 shares of the issued and outstanding stock of The WGAR Broadcasting Company; and

<sup>4</sup> Mrs. Richards individually holds 168,990 shares of WJR, The Goodwill Station, Inc.  
16 F.C.C.

Chairman of the Board of Directors of the three corporations. His Last Will and Testament and codicils, naming his widow, Frances S. Richards, as executrix, were admitted to probate in the Superior Court of the State of California in and for the County of Los Angeles on June 19, 1951. Letters Testamentary were issued to Mrs. Richards on June 19, 1951, and on the same date she executed the oath required of an executrix under the laws of California.

11. Question No. 5 of FCC Form No. 316, the application forms filed by Mrs. Richards in requesting consent to transfer of control, reads in part as follows:

Does the assignee (or transferee) propose to continue present program policies and schedules without substantial change?

In each of the respective application forms Mrs. Richards answered the above question "Yes," attaching, as part of the answer, an exhibit which reads identically in each case (except for the name of the particular station involved), as follows:

As stated in response to paragraph 5, it is proposed to continue present program policies and schedules without substantial change. Attached hereto is a copy of the licensee's Statement of General Policies and rules governing the acceptance of Program Material and Advertising Copy which sets forth the licensee's present program policies. This code will be continued in effect and will be scrupulously complied with in the operation of [the station]. [The station] will be operated in full compliance with all applicable statutes and Commission rules, regulations and decisions.

12. Because of the relation of the foregoing answer to the issues in the renewal proceeding, and to enable the Commission to give proper consideration to the transfer applications, the Commission, by letters dated September 6, 1951, informed Mrs. Richards that a clarification of the program policies proposed by the transferee for each of the stations was required, and that:

Accordingly, in accordance with Section 308(b) of the Communications Act of 1934, as amended, you are requested to furnish the Commission on or before September 25, 1951, a supplementary statement setting forth therein such additional information as you deem appropriate for clarification of the matter described above.

13. On September 17, 1951, in response to the above-mentioned letters, the Commission received the "Supplementary Statement" of Mrs. Richards in connection with and amending each of the three transfer of control applications. The statements are similarly worded and bear the affidavits of Mrs. Richards, which declare that "said Supplementary Statement, and each statement and assurance therein contained, are true to the best of her knowledge and belief." In addition, attached to the statements are the affidavits of John F. Patt, the president of the three corporations, and the affidavit of the top operating official of each of the respective stations, Robert O. Reynolds, vice president and general manager of KMPC, The Station of the Stars, Inc.; Worth Kramer, vice president and general manager of WJR, The Goodwill Station, Inc.; and Carl E. George, vice president and general manager of The WGAR Broadcasting Company. In these last-named affidavits deponents attest to the truth "to the best of his knowledge and belief" of the "Supplementary Statement and each statement and



assurance therein contained," and each asserts that "he will devote his best efforts to carrying out said statements and assurances."

14. The assertions in the Supplementary Statements are drafted with reference to the alleged conduct and activities of Mr. Richards which were specified in the designated issues in the renewal proceeding. Preliminarily, however, Mrs. Richards states that in her answer to Question No. 5 (Par. 11, above), she understood and assumed that the word "present" in the question referred to the date she subscribed and swore to the transfer applications, June 23, 1951; that her answer was intended to cover policies and schedules in effect on and after June 23, 1951, and not those in effect prior thereto; that by "phrasing her Answer as broadly and unqualifiedly as possible, and by not limiting its scope and effect by reference to particular matters, [she] intended that the Commission be given adequate assurance of full compliance by the licensee corporation, its officers and employees with all applicable statutes and Commission rules, regulations and decisions"; that she did not intend to state or imply that there would be no such changes in the program policies and schedules as might be necessary or desirable to improve the operation of the stations and their service in the public interest; and that she did not intend to state or imply that there would not be such changes in the program schedules "as necessarily and normally occur in the operation of a properly conducted broadcast station in the public interest." Continuing, Mrs. Richards declares that there were not in effect on June 23, 1951, or at any time since then, and that there will not be in the future, any policies, instructions or directives to officers or employees of the three stations, or any actions or attempts of any kind, directly or indirectly tending in any way: (1) to present news broadcasts in a manner designed to give a biased or a one-sided presentation of the news (see Issue No. 1(a)); (2) to broadcast false news concerning particular issues or persons (see Issue No. 1(b)); (3) to broadcast editorials of daily newspapers as news items and without identification of such items as editorials (see Issue No. 1(c)); (4) to discriminate in news and other broadcasts in favor of any political causes, groups or candidates as against the interest of other political causes, groups or candidates (see Issue No. 1(d)); (5) or in any manner to promote or further any private political, social or economic views and interests of any officer, director, stockholder or employee of the three stations (see Issue No. 1(e)). On the contrary, she stated, there were in effect on June 23, 1951, at all time since then, and there will be in the future, the policies set forth in the "Statement of General Policies," attached to the exhibits to her answers to Question No. 5 (which embodies an exemplary code for the operation of a broadcast station); and all officers, employees and others concerned "were on June 23, 1951, are, and will continue to be, under instructions that they must strictly adhere both to the spirit and the letter of the foregoing, as well as all other provisions in said 'Statement of General Policies,' copies of which have been, and will continue to be, furnished to all of them." With further relation to the issues in the renewal proceedings, Mrs. Richards avers: that on June 23, 1951, and at all times since then and in the future, no

disciplinary action has been, is being, or will be taken against any officer or employee of the three stations for failure or refusal to do any of the things set forth in (1) to (5) above (see Issue No. 2), but that, on the contrary, during such period the officers and employees have been and will continue to be subject to disciplinary action for failure or refusal to adhere to the policies set forth in the "Statement of General Policies"; that neither on June 23, 1951, nor at any time since then, have the facilities of the station been used, nor will they be used in the future, to do any of the things set forth in (1) to (5) above (see Issue No. 3), but that, on the contrary, the facilities have been and will be used in accordance with the policies set forth in the "Statement of General Policies"; and that neither on June 23, 1951, nor at any time since then, nor at any time in the future will there be, any inaccurate representations made by or on behalf of the corporate licensees, or any of its officers, employees or stockholders to the Commission (see Issue No. 4).

15. Copies of the Commission's letters of September 6, 1951, were furnished the General Counsel of the Commission, and to others in interest. On October 5, 1951, there was filed with the Commission a document entitled "Comments of General Counsel and Chief of the Broadcast Bureau concerning Supplementary Statements of Executrix." In these Comments the General Counsel and the Chief of the Broadcast Bureau reiterate their objection to "a decision on the renewal applications without following the normal procedures for disposition of formal proceedings"; state that in their opinion the Supplementary Statements are not responsive to the Commission's request for clarification in the letters of September 6, 1951; contend that in the light of the record herein and the position repeatedly taken by the corporate applicants, the Supplementary Statements do not give adequate assurance that the applicants' concept of operation "in the public interest" and "in accordance with applicable statutes, Commission rules and decisions" is at all different from the policies and practices which occasioned these proceedings; maintain that in the light of the past conduct and actions of the present officials of the stations, substantial doubt exists as to the reliance which can properly be placed upon the representations in their affidavits; especially since, as they assert, these officials have not unequivocally repudiated past objectionable practices; and argue that the proceedings should not be terminated without a "decision containing findings based upon all the facts of record," including rulings on the motives and credibility of various persons upon which a cloud has been cast by the tactics of the applicants in the renewal proceeding. Accordingly, they request that the Commission: (1) grant their motion to direct the Examiner to issue an Initial Decision containing findings and conclusions upon the entire record, or (2) consider their exceptions with the view to the issuance of a decision by the Commission itself; and pending the issuance of a decision by the Examiner or the Commission that the Commission reject the Supplementary Statements or defer consideration thereof.

16. We are of the opinion that the Examiner properly concluded that the death of Mr. Richards rendered moot the questions presented under the issues of the renewal proceeding, as the only

subject of inquiry was the qualifications of the licensees while under Mr. Richards' personal direction or control. To arrive at this determination it was obviously unnecessary for him to make the detailed findings and conclusions requested by the General Counsel, as they were no longer material. We cannot agree with the General Counsel and the Chief of the Broadcast Bureau that the transcript reference cited by them (see Par. 5, above) indicates that Mr. Richards' death did not mark a terminating point in the proceedings; there is no connotation in that testimony that the allegedly improper practices under Mr. Richards' regime would continue. However, the Examiner did not rule on the ultimate issue upon which the matter was designated for hearing—whether “in the light of the facts adduced under the foregoing issues [relating to the role of Mr. Richards] to determine the qualifications of KMPC, The Station of the Stars, Inc.; WJR, The Goodwill Station, Inc.; and WGAR Broadcasting Company . . . a grant of the said applications would serve the public interest, convenience and necessity” (see Issue No. 5). Despite the fact that dismissal, as such, without passing upon the designated material issues, is not a prerogative of an Examiner, any strictures against the propriety of the Examiner's ruling herein are of no moment in the light of the action we ourselves are taking today.

17. We have given careful consideration to the Supplementary Statements and the Comments of the General Counsel and the Chief of the Broadcast Bureau. The Supplementary Statements, in our opinion, are responsive to our letters of September 6, 1951, and constitute a rejection of the alleged practices and policies which led to the institution of the renewal proceeding and a positive representation, upon which we rely, that the alleged practices and policies of the type under inquiry in the renewal proceeding will not occur in the future.

18. We are advised in the applications for consent to transfer of control that since the death of Mr. Richards, F. Sibley Moore was elected to the Board of Directors of KMPC, The Station of the Stars, Inc., and The WGAR Broadcasting Company; and that the membership of the Board of Directors of WJR, The Goodwill Station, Inc., has been increased from five to seven, F. Sibley Moore, Worth Kramer and Seldon S. Dickinson having been elected to the Board. These new directors and Frances S. Richards, the executrix, are native-born citizens of the United States and are qualified to be licensees of this Commission.

19. As indicated above, the issues of the renewal proceeding, except the issue relating to renewal *vel non*, have become moot in view of Mr. Richards' death. Appropriate transfer applications have been filed. Upon review of these transfer applications as amended by the Supplementary Statements, which have been consolidated herein and made a part of this record, and for the reasons set forth above, we find that the operation of Stations KMPC, WJR and WGAR, as proposed therein, would serve the public interest. Accordingly, we believe that the public interest, convenience and necessity will be served by terminating this proceeding simultaneously granting the above-entitled renewal and transfer applications. Thus, applicants' counter-petition requesting grant of the renewal applications should be granted. This disposition

makes it unnecessary to rule upon the exceptions to the Initial Decision or the motion to strike the exceptions and we are therefore dismissing them as moot. Nor, under the circumstances, is oral argument required.

## ORDER

20. *Accordingly, it is ordered*, This 28th day of November, 1951;

(1) That the "Petition to set aside purported 'Initial Decision', etc.," filed by the Chief of the Broadcast Bureau and the General Counsel of the Commission on June 15, 1951, *is denied*;

(2) That the counter-petition, filed by the applicants, on June 25, 1951, insofar as it requests immediate grant of the above-entitled renewal applications, *is granted*;

(3) That the above-described exceptions, filed July 3, 1951, by the Chief of the Broadcast Bureau and the General Counsel and the motion to strike the exceptions, filed July 11, 1951, by the applicants, *are dismissed* as moot;

(4) That the above-entitled applications for renewal of the licenses of Radio Stations KMPC, WJR and WGAR, *are granted*; and

(5) That the above-entitled applications for consent to involuntary transfer of control, as amended, of the three corporate licensees, to Frances S. Richards, Executrix of the Estate of G. A. Richards, deceased, *are granted*.

## CONCURRING OPINION OF CHAIRMAN COY AND COMMISSIONER HENNOCK

We concur in the foregoing opinion. However, so that there will be no misunderstanding of our position, we want to make clear our disapproval of conduct of the type under inquiry in the renewal proceeding and on which the Commission is not making findings of fact or drawing conclusions due to the death of Mr. Richards and the program policy statement of Mrs. Richards in seeking approval of the Commission for the involuntary transfer of Mr. Richards' interests to her as executrix of his estate (see Par. 14). We recognize that the personal equation inevitably enters into the selection and broadcasting of news items, but conduct which manifests a disregard of the goal of objectivity in news presentation cannot help but adversely affect character qualifications under the Communications Act.

It should also be emphasized that it was in reliance upon Mrs. Richards' repudiation of the conduct under inquiry in the renewal proceeding and her representation that it would not occur in the operation of the stations under her control, that we voted to terminate this proceeding in the manner in which we have (see Pars. 17 and 19).

## DISSENTING OPINION OF COMMISSIONER WALKER

I am of the opinion that the Examiner exceeds his authority in his tentative opinion directing dismissal of the proceedings, due to the death of Mr. G. A. Richards.

The Order of Reference directed the Examiner to make findings of fact and conclusions of law. This he should do. It is the Commission's function then to say whether or not the case is moot. The public importance of the issues involved and the time, effort and sacrifice expended in developing the record are too great to permit the waiving of findings of fact and conclusions of law. After such findings and conclusions have been made, then the Commission can properly decide whether the death of Mr. Richards warrants dismissal of the proceedings.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON 25, D.C.

In re Application of  
LAKELAND BROADCASTING CORPORATION,  
WAUSAU, WISCONSIN  
For Construction Permit.

} DOCKET No. 8208

December 4, 1951

**APPEARANCES**

*Russell Rowell and James E. Doyle*, on behalf of Lakeland Broadcasting Corporation; *Charles V. Wayland and John R. Tomek*, on behalf of John R. Tomek; and *Robert Koteen and A. Harry Becker*, on behalf of the Federal Communications Commission.

**DECISION**

BY THE COMMISSION (CHAIRMAN COY AND COMMISSIONER STERLING  
DISSENTING; COMMISSIONER HENNOCK NOT PARTICIPATING):

**PRELIMINARY STATEMENT**

1. In this proceeding Lakeland Broadcasting Corporation (Docket No. 8208) and John R. Tomek (Docket No. 8881), an individual, had requested a permit to construct a new Class IV standard broadcast station to operate at Wausau, Wisconsin, on the frequency 1230 kc, with power of 250 watts, unlimited time. The applications were mutually exclusive and were heard in a consolidated proceeding in Wausau, Wisconsin, on October 27-28, 1948, and in the offices of the Commission at Washington, D.C., on December 21, 1948, before Examiner Basil P. Cooper. Prior to the issuance of a Proposed Decision, both applicants filed petitions requesting the Commission to reopen the record to show changes in the corporate organization of Lakeland Broadcasting Corporation. By Order dated September 8, 1949, the Commission granted the petitions insofar as they requested that the record be reopened to determine the future residence of an officer and director of the applicant corporation and what participation, if any, that officer and his wife would take in the station proposed by Lakeland Broadcasting Corporation. Thereafter, on September 15, 1949, Lakeland Broadcasting Corporation filed a pleading entitled "Petition to Enlarge Issues for Further Hearing and to Supplement Previous Motion for Hearing in the Field." The Examiner interpreted the pleading to be one requesting authority to present testimony relative to matters which were in issue in the original hearing, and on September 16, 1949, denied the petition. Thereafter, an appeal was taken to the Commission